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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

VERNONIA SCHOOL DISTRICT 47J,
Petitioner,

v.

WAYNE ACTON and JUDY ACTON,
guardians ad litem for JAMES ACTON,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICUS CURIAE* OF PARADISE VALLEY UNIFIED SCHOOL DISTRICT NO. 69 IN SUPPORT OF PETITIONER

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This brief is filed with consent of both parties. Letters of consent are on file with the Clerk of this Court.

STATEMENT OF INTEREST

The Paradise Valley School District is the third largest school district in Arizona, with 34 schools and approximately 31,000 students.

Partly in reliance on the Seventh Circuit decision in *Schaill by Kross v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309 (7th Cir. 1988), *reh'g denied* (1989), the Paradise Valley School District adopted a random drug testing program for athletes. However, the program was especially tailored to respect students' privacy rights. The urine sample is given by the student in the nurse's office in conditions of complete privacy, with no one else watching or listening. (Joint Stipulated Statement of Facts, ¶¶ 23-33, Defendants' Exhibits 6, 7, 9, 13, 17 & 18, and MouleDepo. at pp. 8-13). There is, therefore, no greater invasion of privacy than a physical examination, which is uncontested, required of all student athletes in Arizona, who must obtain physical examinations, including providing a urine sample, in order to qualify for athletics in the first place.

In fact, the Arizona Interscholastic Association requires an exhaustive annual physical examination to qualify for athletics. The student must disclose and explain, where applicable, past illnesses, hospitalizations, surgeries and present use of medication. Either or both of these procedures typically include physical manipulation of a male student's genitalia and/or a rectal examination. The AIA rules can require retesting. Being told to go into the nurse's office, be by yourself, and provide a urine sample, is much less of an intrusion than any of these things.

Nevertheless, following the Ninth Circuit decision in *Acton v. Vernonia School Dist.*, 796 F. Supp. 1356 (9th Cir. 1994), the Arizona District Court declared the Paradise Valley system to be unconstitutional.

The background to the Paradise Valley testing program is as follows:

In 1985, a survey was done of the community in connection with a five-year plan for the school district. The results of the survey were that drug was the number one problem. Prevention programs were instituted. These

included written alcohol and drug intervention policies, frequent in service of faculty and students, life skills curriculum, alcohol-free graduation parties, chapters of students against drunk driving, peer leadership programs, and so on.

Nevertheless, a 1988-89 survey showed more than one in five used marijuana, at least monthly, and one in ten used cocaine at least monthly. Another, in 1991, showed one in five students admitted attending school under the influence of alcohol or drugs. Coaches noticed athletes apparently under the influence of steroids. In a July, 1990 survey, 22.3% of high school athletes reported in-season steroid use by team members. Almost half of the coaches reported a belief that athletes on their team used cocaine, steroids or other illegal drugs during the season. Student athletes, parents and coaches believed that 10 to 25% of their child's teammates used illegal drugs. (Stipulated exhibits 1, 2, 5.)

One of the factors leading to the institution of the random drug testing of student athletes was the perception that use of steroids among students had become a significant problem. Attempting to identify the offending students was inadequate. (This is confirmed by the record in the current case before this Court at the trial level: visual observations, even by professionals, are not reliable indicators of whether a student has consumed alcohol or drugs. 796 F. Supp. at 1364.) Strong action was needed out of concern for the health of the student athletes.

Long-term effects of use of steroids include (1) atrophy of the testes, prostrate cancer and impotence; (2) high blood pressure and heart diseases, including cases of bypass operations that were necessary; (3) liver tumors and failure of liver function; (4) stunted growth and permanent short stature in children and teenagers; (5) a 1988 study linked use to "steroid psychosis" marked by

hallucinations, delusions of grandeur, and violent mood swings. Twelve percent of the body builders studied were psychotic: severe paranoia and auditory hallucinations; while another ten percent were described as subthreshold psychotic. *See Beyond Steroids: Human Growth Hormone,* published by Do It Now Foundation, Tempe, Arizona (1989).

The drug testing program has been extremely popular with students and parents. Parents are 18 times more likely to want random testing continued rather than discontinued, and student athletes agree more than 15 to 1 that the program should be continued. Exhibit 16.

The interests of the Paradise Valley School District in reversal of the Ninth Circuit decision, and support of the Seventh Circuit decision, include the following:

(1) Those who sued to declare the program unconstitutional admit that it is perfectly proper in private schools. Paradise Valley, like many public schools across the country, is striving mightily to maintain academic standards equal to or greater than those of private schools. However, if the courts impose a system under which private schools can effectively combat the drug culture among students, whereas public schools cannot, the effort to maintain high academic standards in public schools will be defeated.

(2) The school board in a public school setting has an especially high degree of duty to maintain a drug-free student culture because children in the community are *required by law* to attend the public school. The school board owes a duty to their parents not to require the children, by law, to attend an institution in which a drug culture is prevalent. The undersigned attorney (Horne) has served 16 years on the Paradise Valley School Board, seven years as its president, and regards it as one of his highest duties not to compel children to come to schools that are infused with a drug culture. The Ninth Circuit

decision in Acton is a major roadblock, and puts the state in the unusual position of requiring children, by law, to come to schools where a drug culture is prevalent and effective means of combatting it have been vetoed by the courts.

(3) The school district has a strong interest in protecting the health of its student athletes. The schools should not maintain a competitive athletic program if it cannot effectively combat use of steroids, where competitive pressures result in some students taking the steroids and later suffer atrophy of the testes, prostate cancer, and impotence, high blood pressure and heart disease, liver tumors, stunted growth and permanent short stature, "steroid psychosis," and the other health problems cited above.

ARGUMENT

I. THE NINTH CIRCUIT APPLIED THE WRONG STANDARD.

The Ninth Circuit decision required that the state show a "compelling interest" in order to satisfy the constitutional test. *See Acton v. Vernonia School Dist. 47J,* 23 F.3d 1514, 1522 and 1527 n.3 (9th Cir. 1994). In doing so, the Ninth Circuit improperly ignored this Court's holding in *New Jersey v. ILO,* 469 U.S. 325 (1985) in which this Court held:

> . . . the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search." 469 U.S. at 341. The Court explained further:
>
> > Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and nature of the infraction.

II. EVEN IF A COMPELLING INTEREST WERE REQUIRED, IT IS SHOWN HERE.

In *International Brotherhood of Teamsters v. Dept. of Transportation*, 932 F.2d 1292 (9th Cir. 1991), it was held that truck drivers can be required to give random urine samples because of the state's interest in preventing truck accidents. Preventing atrophy of the testes, prostrate cancer and impotence, high blood pressure and heart disease, liver tumors, stunted growth and permanent short stature, and "steroid psychosis" is an interest that a community has in its children, which is at least as great as that of preventing truck accidents.

III. THE NINTH CIRCUIT MISQUOTED THE FACTS OF ITS CASE.

The Ninth Circuit stated:

> Appellee's contention that conditions in the locker room reduce an athlete's expectation of privacy is similarly unavailing. Normal locker room or restroom activities are a far cry from having an authority figure watch, listen to, and gather the results of one's urination.

Acton, 23 F.3d at 1525.

However, in the Facts section of the same decision, the Ninth Circuit stated:

> A male faculty member, either Mr. Aultman or Mr. Svenson, a coach, is seated on a bench some 12 to 15 feet away while the boy urinates. The student remains fully clothed with his back to the monitor. At no time does the monitor have a view of the student's genitals. Aultman and Svenson testified that they do not always watch the student while he produces the specimen, but they generally listen for the normal sounds of urination. After the student produces the specimen, he returns the cup to the monitor who checks it for temperature and obvious signs of tampering.

Id. at 1517.

In the *Acton* case, the authority figure did not "watch" anyone urinating. Listening from 12 to 15 feet away is far less of an intrusion into privacy than is quite common among student athletes in school locker rooms.

Considering the strong interests in preventing a student drug culture described above, to the extent that such listening is an intrusion at all, beyond what normally occurs in the locker room, it is certainly "reasonable" to protect the legitimate interest of preventing a student drug culture and the other interests described above.

Also, as described in the Facts section above, it is far less of an intrusion than the physical exam required of all students before they are eligible to participate in athletics.

IV. PUBLIC SCHOOL PROGRAMS LIKE THAT IN PARADISE VALLEY INVOLVE NO INTRUSION AT ALL INTO STUDENT PRIVACY.

If this Court were to agree with the Ninth Circuit that having someone 12 to 15 feet away listening for signs of urination is too great an intrusion into privacy to justify the interests in preventing student athletes' use of drugs described above, then we ask the Court to indicate at the same time that public school programs like that in Paradise Valley, *where there is no intrusion into student privacy at all,* would still be constitutional. We assume that this Court does not want to deal with random drug testing of student athletes more than once. Therefore, we respectfully request that if this Court should agree with the Ninth Circuit, that listening from 12 to 15 feet away is too great an intrusion of privacy, outweighing all of the school district's interests in preventing a student drug culture, etc., then we ask that the decision indicate that in programs like that of Paradise Valley, where the urine sample is given in complete privacy, the program is constitutional.

V. THE NINTH CIRCUIT IGNORED SEVERAL OTHER COMPELLING CONSIDERATIONS PUT FORTH IN *SCHAILL*.

The following compelling considerations in *Schaill* are not effectively answered by the Ninth Circuit in *Acton*:

> In the first place, in athletic programs in general there is a much diminished expectation of privacy and, in particular, privacy with respect to urinalysis. There is an element of "communal undress" inherent in athletic participation, which suggests reduced expectations of privacy. In addition, physical examinations are integral to almost all athletic programs. In fact, athletes and cheerleaders desiring to participate in the TSC athletic program have long been required to produce a urine sample as part of a mandatory medical examination.
>
> * * * *
>
> Perhaps even more demonstrative of the special characteristics of athletics is the high visibility and pervasiveness of drug testing in professional and collegiate athletics in this country and in the Olympic Games. The suspension and disqualification of prominent athletes on the basis of positive urinalysis results has been the subject of intense publicity all over the world. See *O'Halloran v. University of Washington*, 679 F. Sup. 997, 1005-07 (W.D. Wash.) (discussing widespread urine testing conducted in collegiate and Olympic athletic competitions, *rev'd on other grounds*, 856 F.2d 1375 (9th Cir. 1988)

864 F.2d at 1318-1319.

CONCLUSION

In a concurring opinion in *TLO*, Justice Powell, joined by Justice O'Connor, stated:

> The primary duty of the school officials and teachers, as the Court states, is the education and training of young people. A State has a compelling interest in assuring that the schools meet this responsibility. Without first establishing discipline and maintaining order, teachers cannot begin to educate their students. And apart from education, the school has the obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct is recent years has prompted national concern. For me, it would be unreasonable and at odds with history to argue that the full panoply of constitutional rules applies with the same force and effect in the schoolhouse as it does in the enforcement of criminal laws.

469 U.S. at 350 (Powell, J., concurring) (footnote omitted). Similarly, Justice Blackman, in his concurrence, noted that:

> Education 'is perhaps the most important function' of government, *Brown v. Board of Education*, 347 U.S. 483, 493, and government has a heightened obligation to safeguard students whom it compels to attend schools.

It is respectfully submitted that the Ninth Circuit has ignored these important principles, improperly required a compelling interest where this Court requires only a reasonable interest, ignored the compelling interest of the community in the health of the children, improperly prevented public schools from maintaining high standards and a healthful atmosphere, and ignored the minimal intrusion compared with students' reduced expectations of privacy in athletics, in the locker room, and compared to the far more intrusive annual physical examination re-

quired of all student athletes, the constitutionality of which is uncontested.

It is therefore respectfully requested that the Ninth Circuit decision be reversed, and the Seventh Circuit decision be supported, or in the alternative, that the Court indicate that programs like that of Paradise Valley, where there is no intrusion into the privacy of the student, are constitutional.

Respectfully submitted,

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